Nos. 75-173 and 75-240

Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged with three murders committed in North Carolina, where he used to reside. He moved to transfer the case for trial in California, where he now resides. He now contends that the district court's order denying the motion to transfer is appealable and that the denial of transfer was an abuse of discretion.

On February 17, 1970, petitioner's wife and two daughters were murdered at petitioner's home in

Fort Bragg, North Carolina. Petitioner, then a Captain in the Army Medical Corps, notified the Military Police and told an investigating unit that four intruders had entered his quarters, attacked him, and killed his wife and children. An investigation failed to confirm this story; petitioner was charged with three specifications of murder, in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. After a military preliminary hearing, these charges were dismissed in October 1970 on the ground of "insufficient evidence to justify reference of the charges for trial by court-martial."

We have been informed by the United States Attorney that from December 1970 to January 31, 1971, the Army investigated petitioner's allegations that people involved in the earlier proceedings had committed criminal acts, including perjury and the destruction of evidence. The Justice Department then requested the Army to continue investigating the murder. In June 1972 the Army forwarded to the Department of Justice its voluminous reports of the investigation. The Department of Justice continued the investigation. In July 1974 the Department began presenting evidence to a grand jury in the Eastern District of North Carolina. On January 24, 1975, the grand jury indicted petitioner for murder, in violation of 18 U.S.C. 1111.[1]

[1] Contrary to petitioner's assertion (Pet. No. 75-173 at 38-40), the grand jury heard substantial evidence that had not been presented at the Army's hearing in October 1970.

On February 23, 1975, petitioner filed a motion, under Fed. R. Crim. P. 21, to transfer the case to the Central District of California, where petitioner had established a residence in the summer of 1971 (some 18 months after the murders). He argued that he could not obtain a "fair and impartial trial" (Rule 21(a)) in the Eastern District of North Carolina, and that a transfer was necessary "[f]or the convenience of parties and witnesses, and in the interest of justice" (Rule 21(b)). The court denied the motion (Pet. No. 75-173 App. B), and on July 1, 1975, the Fourth Circuit dismissed petitioner's appeal on the ground that an order denying transfer is not appealable (Pet. No. 75-173 App. A). On July 10, 1975, petitioner filed in the court of appeals a petition for a writ of mandamus to direct the district court to set aside its order denying the motion for a transfer.[2] The court of appeals denied that petition on July 15, 1975 (Pet. No. 75-240 App. A). Petitioner seeks review of both the July 1 and July 15 orders. Both petitions contest only the denial of relief under Rule 21(b).[3] However, there is no con-

[2] The district court also denied petitioner's other pretrial motions, including motions to dismiss the indictment on speedy trial and double jeopardy grounds. The court of appeals has stayed petitioner's trial pending appellate review of the denial of these motions.

[3] Rule 21(b) provides:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

flict among the circuits on any of the issues petitioner presents. Petitioner's contentions turn upon the rather unusual facts of his case, and he presents no question of general importance requiring review by this Court.

1. Petitioner contends (Pet. No. 75-173 at 12-22) that the court of appeals erred in holding that the district court's denial of his Rule 21(b) motion is not appealable. It is settled, however, that such an order is not a final judgment and is therefore not appealable. *United States* v. *Foster*, 296 F.2d 249 (C.A. 4); *United States* v. *Brown*, 301 F.2d 664 (C.A. 4); *Semel* v. *United States*, 158 F.2d 231 (C.A. 5); *United States* v. *Garber*, 413 F.2d 284 (C.A. 2); *Auerbach* v. *United States*, 347 F.2d 742 (C.A. 5), certiorari denied, 382 U.S. 958; *Holdsworth* v. *United States*, 179 F.2d 933 (C.A. 1). Cf. *United States* v. *National City Lines*, 334 U.S. 573, 594; *Parr* v. *United States*, 351 U.S. 513, 518.

Petitioner argues that his chief attorney would be unable to conduct his defense if the trial were to take place in North Carolina, and that a trial in North Carolina would be twice as expensive as a trial in Los Angeles, thereby exposing him to bankruptcy. Assuming *arguendo* (but see pages 7-11, *infra*) that these allegations are accurate, there is still no justification for treating the district court's denial of the Rule 21(b) motion as an appealable order. An interlocutory order does not become appealable merely because compliance may be costly. Nor can petitioner reasonably argue that representation by any lawyer other than

Mr. Segal would deprive him of effective assistance of counsel. It is true that petitioner will have to hazard a trial in North Carolina before he can appeal the district court's refusal to transfer his case; as this Court observed in a similar context, however, "bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship."[4] *Parr* v. *United States*, *supra*, 351 U.S. at 519-520 (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 325).

Petitioner's reliance on *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, is misplaced. *Cohen* involved a collateral order that could not be reviewed at all unless reviewed before trial. See *United States* v. *Ryan*, 402 U.S. 530, 533. The order in the instant case, by contrast, is but one step toward a final judgment; it will be reviewable at that point if petitioner is convicted.[5] Moreover, *Cohen*

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[4] Contrary to petitioner's suggestion (Pet. No. 75-173 at 18), the events that occur during the trial will provide an appellate court with additional information bearing on the question whether the denial of the motion to transfer was an abuse of discretion. Petitioner's argument that the district court abused its discretion is based in large part on his estimates (many of them disputed by the government) relating to factors such as the length of trial, the number and location of witnesses, expenses to be incurred, and so on. After trial, these disputed estimates will become known facts.

[5] *Cohen* also stressed (337 U.S. at 547) that the order at issue there presented a "serious and unsettled question" of law; the appealability question would have been differently decided, the Court stated, if the order involved (as it does here) merely an exercise of discretion.

was a civil case. This Court has stressed that piecemeal review is "particularly damaging to the conduct of criminal cases." *DiBella* v. *United States*, 369 U.S. 121, 124; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324-326. See *Berman* v. *United States*, 302 U.S. 211, 212-213. Petitioner argues as if the lack of pretrial appeal has deprived him of meaningful consideration of his contentions. But his arguments have been fully presented to the district court, which ruled against him. The Due Process Clause requires no more, for, as this Court has repeatedly held, there is no constitutional right to appeal, even on the merits of guilt or innocence, in a criminal case. *Ross* v. *Moffitt*, 417 U.S. 600; *McKane* v. *Durston*, 153 U.S. 684.

2. The court of appeals also properly denied the petition for a writ of mandamus. Mandamus will lie to review an interlocutory order in a criminal case only when the district court's ruling is not only incorrect but also outside the scope of its legitimate authority. See, *e.g.*, *Parr* v. *United States*, *supra*, 351 U.S. at 520-521; *Jones* v. *Gasch*, 404 F.2d 1231 (C.A.D.C.), certiorari denied, 390 U.S. 1029. Although petitioner argues that the district court has abused its discretion, he has not argued (nor could he) that the court overstepped its authority by requiring him to stand trial in the district in which the crime was committed.[6] The district court was

[6] Mandamus sometimes is appropriate to redress abuse of discretion, but this use of the writ is appropriate only when

entitled to determine (Pet. No. 75-173 App. 3a-8a) that petitioner should be tried in the vicinage of the crime. Although a trial in North Carolina would be more expensive to petitioner than one in Los Angeles (*id.* at 5a), the court held that petitioner's allegations of financial hardship are exaggerated[7] and that, in any event, the financial hardship to petitioner would be outweighed by other considerations.

The "location of events likely to be in issue" (*Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 244) is the Eastern District of North Carolina, the district where the crime was committed and

the court has issued an order for which there is no remedy by appeal. The Fourth Circuit itself has issued mandamus to correct an abuse of discretion during discovery (*Board of Parole* v. *Merhige*, 487 F.2d 25, certiorari denied, 417 U.S. 918). Mandamus might often be an appropriate remedy when invoked by the government, for no appeal from an erroneous acquittal is possible and mandamus may be a necessary device to preserve the government's rights under the Criminal Appeals Act. Petitioner's case is not an appropriate one for the use of mandamus to correct an abuse of discretion, however, because the propriety of the district court's decision not to transfer his case can be reviewed on appeal.

[7] With respect to petitioner's claim that he could continue with much of his work as a doctor if the trial were in Los Angeles, the court noted (Pet. No. 75-173 App. 5a): "It is difficult to see how [petitioner] could practice medicine to any appreciable extent while engaged in the trial of the very serious charges which have been brought against him." The court also found (*id.* at 7a-8a) that petitioner overestimated the likely length of the trial as well as the added expense in Raleigh of renting office space and equipment and hiring secretaries, stenographers, and expert witnesses.

where petitioner and his family lived at the time of the offense.[8] As the government informed the district court (Response to Motion for Transfer, p. 13), the prosecution desires the jury to view the scene of the crime (petitioner's former residence at Fort Bragg), which has been preserved since the crimes were committed. A jury view of those quarters will contribute substantially to an accurate understanding of the evidence in this case.

The district court also correctly concluded (Pet. No. 75-173 App. 5a-6a):

> A substantial number of the possible witnesses for the government and [petitioner] are located in the Eastern District of North Carolina, and there has been no showing that non-resident fact

[8] Petitioner has no constitutional right to be tried in Los Angeles simply because he established residence there subsequent to the crime. *Platt, supra,* 376 U.S. at 245. Indeed, the Constitution contains two provisions to ensure that a person be tried where the offense was committed. Sixth Amendment; Art. III, Sec. 2. We recognize that these provisions were written in an age of restricted travel and mobility. Their effect, therefore, was often to ensure trial at the place of defendant's residence. But this is not to say that a resident of one State who commits a crime there is entitled to be tried wherever he later chooses to reside. See Wright, *Federal Practice and Procedure (Criminal)* § 301, pp. 581-582 (1969):

> Those [on the Court] who have argued, sometimes for the majority and sometime in dissent, that the policy of the Sixth Amendment favors trial at defendant's residence would assert only that where it can reasonably be said that the offense was committed at the defendant's residence, this is where he ought to be tried.

> witnesses for either party live in or nearer to California than to North Carolina.[9]

With respect to petitioner's allegations that "*all*" (Pet. No. 75-240 at 13) of his character witnesses reside in California, the court observed (Pet. No. 75-173 App. 6a) that the "character witnesses in position to offer more pertinent testimony would be those who reside on the east coast and who knew [petitioner] prior to the date of the crime." Accordingly, Raleigh, North Carolina—"which is connected by all forms of transportation with all of the principal cities in the United States" (*id.* at 7a)—is quite possibly "more accessible" (*ibid.*) to the parties and witnesses than is Los Angeles.[10]

The docket conditions of the two districts involved also support the denial of the motion to transfer. The docket in the Eastern District of North Carolina per-

[9] The government informed the district court that, of the 108 prospective witnesses for the prosecution, 38 live in the Eastern District of North Carolina, 44 live outside of that district but in the Eastern time zone, and only 8 live in the Pacific time zone (Response to Motion for Transfer at 5-6).

[10] In an attempt to show the greater accessibility of Los Angeles (Pet. No. 75-173 at 34-38; Pet. No. 75-240 at 43-46), petitioner asserts (Pet. No. 75-173 at 36) that it is more convenient to commute between Washington, D.C. (where an associate defense counsel works) and Los Angeles than between Washington, D.C. and Raleigh. The flight time from Washington, D.C. to Los Angeles is about 5 hours. There are five daily nonstop flights from the Washington area airports to Raleigh and three daily "through" flights making one stop. The longest of these eight daily flights takes 2 hours and 30 minutes. Official Airline Guide, North American Edition (October 1, 1975), pp. 467, 718.

mitted the trial to be set for August 1975 (although its commencement has been stayed, at petitioner's behest, by the court of appeals). On the other hand, if the case were transferred to the Central District of California "it would be many months if not a year or more before it could be reached for trial" (*id.* at 7a, n. 2).[11]

Finally, petitioner's claim (Pet. No. 75-173 at 9, 17, 21, 22, 27-30; Pet. No. 75-240 at 9-10, 13, 16, 22, 24, 36-40) that the failure to transfer his case will make it impossible for Mr. Segal to represent him is unpersuasive. Indeed, Mr. Segal himself vacillates on this matter. Both petitions for certiorari assert that it would be impossible for Mr. Segal to conduct the defense if the trial is held in North Carolina. But petitioner's Motion to Transfer (p. 14) alleged only that a trial in North Carolina would

[11] Petitioner asserts (Pet. No. 75-173 at 34) that Chief Judge Butler, one of three judges in the Eastern District of North Carolina, retired on July 1 without replacement. We are informed that Judge Butler has resigned as Chief Judge but still is an active judge and plans to continue to hold court as frequently as before. Moreover, contrary to petitioner's assertions (Pet. No. 75-173 at 34, n. 20; Pet. No. 75-240 at 41-42, n. 39), it was entirely appropriate for the district court to communicate with Judge Hill of the Central District of California to ascertain the present status of the docket there. Judge Hill could properly take judicial notice of the time that would probably elapse before petitioner's case could be tried in Los Angeles; the district court below could properly rely on that information—especially because petitioner's statistics comparing the "disposition" time in each district are inconclusive for a number of reasons (such as the failure to take account of guilty pleas).

create a "substantial likelihood" that Mr. Segal would be unable to represent petitioner. And Appendix D to each petition asserts that the cost of a trial in North Carolina would include $2,400 for Mr. Segal's transportation and $3,500 for his living expenses. However that may be, Mr. Segal probably cannot represent petitioner in California should the case be transferred; Mr. Segal "is not a member of the California bar, and for this reason he would be precluded by Local Rule 1.3 of the District Court for the Central District of California from appearing as counsel for [petitioner] if the case should be removed to that court for trial" (Pet. No. 75-173 App. 6a).[12]

The district court's opinion reflects a careful and balanced consideration of the ten relevant factors

[12] Relying on *Munoz* v. *Hauk*, 439 F.2d 1176 (C.A. 9), certiorari denied *sub nom. Curtis* v. *Munoz*, 404 U.S. 1059, petitioner argues (Pet. No. 75-240 at 13) that attorneys in Segal's position have been allowed to appear in the Central District of California despite Local Rule 1.3. But *Munoz* involved a conflict among the district judges concerning whether a now-revoked local rule permitted attorneys residing in the Central District to appear *pro hac vice* if they did not maintain a law office in the district; the Ninth Circuit resolved the ambiguity in favor of the attorney seeking admission. The local rules were amended and now clearly prohibit Segal's appearance on three independent grounds. Because of Local Rule 1.3, Segal was recently not allowed to appear as petitioner's counsel of record in a bail reduction hearing before a Magistrate in Los Angeles, even though the government consented to Segal's appearance at that hearing. Although it is conceivable that Mr. Segal could persuade the Ninth Circuit to relieve him of the effect of Local Rule 1.3, such proceedings could take many months, making trial in California still less attractive compared to the prompt trial available in North Carolina.

articulated in *Platt, supra*, 376 U.S. at 243-244.[13] The district court's refusal to transfer was a proper exercise of its discretion; no exceptional circumstances exist to justify relief at this stage of the proceedings.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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[13] Petitioner's allegations that the court failed to appreciate important facts are unpersuasive. For example, petitioner states (Pet. No. 75-240 at 15) that the district court erred in finding that he had not retained local counsel to appear with his out-of-state attorneys. But the point of the court's reference to petitioner's failure to use local attorneys was that local counsel would help reduce petitioner's expenses. Similarly, there is nothing to indicate that the district court "ignored" petitioner's claim (Pet. No. 75-240 at 16) that Segal would be unable to represent him in the Eastern District of North Carolina. The court's opinion (Pet. No. 75-173 App. 6a) simply emphasized the more important consideration—that the Local Rules of the Central District of California clearly prohibit Segal's appearance *there*.

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